NO. 71-300

IN THE

Supreme Court of the United States

OCTOBER TERM 1971

THOMAS L. ANDREWS, *Petitioner*

V.

LOUISVILLE & NASHVILLE RAILROAD CO., ET AL,
Respondent

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE PETITIONER

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INDEX

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SUMMARY STATEMENT OF THE CASE

The Petitioner brought this action in the Superior Court of Fulton County, Georgia, seeking to recover damages from Respondent. The Petitioner alleged that while he was employed by Respondent, he was injured by a third party, necessitating a medical furlough; that Petitioner was subsequently medically examined and pronounced fit to return to work, but that Respondent failed and refused to remove Petitioner from medical furlough status, which actions on the part of Respondent, Petitioner alleges constituted a wrongful discharge actionable at common law. Respondent denies these allegations. Petitioner did not exhaust his administrative remedies prior to filing suit.

The cause of action was then removed to the United States District Court, Northern District of Georgia, Atlanta Division, by the Respondent, who then moved to dismiss the Complaint on the grounds that Petitioner had failed to exhaust his administrative remedies.

Respondent's Motion to Dismiss on that ground was granted and an Order was entered against Petitioner on April 7, 1970. After Petitioner's Motion for Re-hearing was granted on June 10, 1970, the District Judge entered an Order permitting Petitioner to amend his Complaint to allege that he had exhausted his administrative remedies, but he could not so allege.

The case was appealed to the United States Court of Appeals for the Fifth Circuit, and on April 26, 1971, an Opinion and Order affirmed the Judgment below. On June 1, 1971, the Motion for Re-hearing was denied in the United States Court of Appeals, without an Opinion.

There was no evidence adduced prior to dismissal of Petitioner's Complaint. Therefore, the issues are limited to the scope of the pleadings.

OPINIONS BELOW

The Opinion and Judgment of the United States Court of Appeals for the Fifth Circuit, United States, rendered April 26, 1971 affirming the Judgment of the United States District Court.

The Order of the United States Court of Appeals for the Fifth Circuit, United States, without an Opinion rendered on June 1, 1971.

JURISDICTION

Jurisdiction of this Court is invoked pursuant to 28 USC 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

This appeal involves no constitutional provisions. This appeal involves the following statutes:

28 USC, § 1254 (1)

48 Stat 1186, Ch 691, §2, 45 USCA §151a,

FCA § Title 45, §151a, USCA 94 L. Ed. 799

Public Law 89-456, 80 Stat 208

QUESTION PRESENTED

Must a discharged (or status equivalent thereto) union employee of a railroad company exhaust his administrative remedies under the *Railway Labor Act* as a prerequisite to maintaining an action for wrongful discharge under a common-law theory seeking damages.

SUMMARY OF ARGUMENT

1) A common-law civil action seeking damages for wrongful discharge has been an historical exception to the exhaustion of remedies doctrine.

2) Nothing in the 1966 amendments (*Public Law 89-456, 80 Stat 208*) in any respect amended or modified the Act to deprive the Federal Courts jurisdiction in these cases. Nothing in those amendments diminished the power of the Federal Courts nor enlarged the scope of the jurisdiction of the Board. Those amendments were procedural only and were designed to decrease the average backlog of claims which was at that time approximately seven and one-half to ten years. The amendments have failed in their purpose as the average backlog is still approximately six years.

The existing law is that an employee may bring an action for wrongful discharge under a common-law theory without exhausting his administrative remedies. No decision has ever reversed this rule. In fact, this Court has steadfastly maintained that position. The Judgment and Opinion rendered by the United States Court of Appeals for the Fifth Circuit is clearly inconsistent with the existing law and policy as established by this Court. The Opinion upon review is premonitory, misapprehending this Court's prior dictum and fails to recognize the relevance of this Court's continuing position as expressed in *U.S. Bulk Carriers, Inc. v. Dominic B. Arguelles* (_____ U.S. _____, 27 L. Ed 2d 456, 91 S. Ct. _____, 1971).

ARGUMENT

1.

An action founded on a common-law theory of wrongful discharge seeking damages therefor is not subject to the general rule that a union railroad employee must exhaust his administrative remedies as a prerequisite to civil redress through the Court.

This exception is historic, and has been preserved since 1940. *(Moore v. Illinois Central Railway Co.*, 312 U.S. 630, 61 S. Ct. 754, 85 L. Ed. 1089, 1940). The reason for this doctrine is two-fold. It is probably best expressed in the case of *Lee v. Virginia Railway Co.*, 89 S.E. 2d 28 (1955). In that case, it was explained that where an employee accepts his discharge as final and seeks damages for breach of contract, then the Courts have jurisdiction. Where the employee later returns to employment with full senority rights, his sole remedy would be to pursue the administrative remedies provided under the Railway Labor Act. Of course, the distinguishing characteristic is whether the relationship of employer and employee exists. Where the past employee remains discharged, he remains in an exempt status.

Cases have permitted a discharged employee to maintain an action seeking damages, a remedy which the Board is without power to provide. Of course, where the employee is seeking reinstatement together with back wages, the Board would have the power, the authority to provide such remedy. But the distinguishing characteristic is not necessarily that the Board does not have power to provide such a remedy, but that the employee, having accepted his discharge as final, alleged to have been injured and damaged by the wrongful acts of the railroad company just as though the railroad company had run over his automobile at a grade crossing or set fire to his corn field.

2.

Nothing in the 1966 amendments (*Public Law 89-456, 80 Stat 208)* in any respect amended or modified the Act to deprive the Federal Courts jurisdiction in wrongful discharge cases. Nothing in those amendments diminished the power of the Federal Courts or enlarged the scope of the jurisdiction of the Board, nor invested the Board with powers to grant additional remedies (damages). Those amendments were procedural only and were designed to decrease the average backlog of claims which was at that time approximately seven and one-half to as much as ten years.

Of course, to completely understand the case, it should be pointed out that the controversy does not involve, effect or concern the rights or obligations of anyone other than Thomas L. Andrews and the railroad. The rights of other employees, present or past, were not involved. This controversy does not involve a "*labor dispute*" as that term is commonly understood; it does not involve the interpretation of a collective bargaining agreement or concern the wages or rates of pay or vacation or retirement or pension or senority rights or working conditions of any class or group of employees. No rights or liabilities of any union are involved, and, of course, this case does not involve the threat of a strike, work stoppage, picketing or any other burden on or interruption of interstate commerce.

The Railway Labor Act as amended in 1934 provides for the resolution of "disputes growing between an employee or a group of employees and a carrier or carriers growing out of a grievance or out of the interpretation or application of agreements concerning rates of pay, rules or working conditions" by the National Railway Adjustment Board (45 U.S.C.A. §153(i)). Disputes of this character shall be handled in the usual manner up to and including the Chief Operating Officer of the carrier designed to handle disputes; but, failing to reach an adjustment in this manner, the dispute *may be* referred by petition of the parties or by either party to the . . . Adjustment Board (45 U.S.C.A. §153(i)); (emphasis supplied).

Prior to the 1934 amendment, phraseology was that such dispute "shall be referred" to the Board and by amendment this phrase was stricken and "may be referred" was inserted by that amendment.

The sole legal question involved in this field is whether *Moore v. Illinois Central Railroad Co.*, 312 U.S. 630, 61 S. Ct. 754, 85 L. Ed. 109 (1941), interpreting the new phraseology as permissive merely, shall be overruled. In *Moore v. Illinois Central Railroad Co.*, an employee was fired allegedly because he had sued the railroad. He exhausted part, but not all of the grievance procedures specified in a collective bargaining agreement between the Union and the Railroad. He then elected to consider his employment as terminated and sued for damages for wrongful discharge. It follows that under the authority of the *Moore v. Illinois Central Railroad Co.* case, the present action by the plaintiff against the Railroad for damages for wrongful discharge is proper in court. No question of the interpretation of the collective bargaining agreement is involved. By virtue of the agreement between the plaintiff's union and the railroad, the plaintiff may not be discharged except for legal cause.

It must be conceded that *Moore v. Illinois Central Railroad Co.* has never been overruled. However, the railroad has urged successfully in the Courts below that even though the *Moore v. Illinois Central Railroad Co.* case has not been overruled it has been *implicitly* modified by *Walker v. Southern Railway Co.*, 385 U.S. 196, 87 S. Ct. 365, 17 L. Ed. 2d 1084 (1966).

But it should be seen that the scope of the *Moore v. Illinois Central Railroad Co.* case was explained in *Slocum v. Delaware L & W R. Co.*; 339 U.S. 239, 70 S. Ct. 577, 94 L. Ed. 795 (1950), in which the railroad brought a declaratory judgment action against two Unions seeking an interpretation of the collective bargaining agreements in respect to a jurisdictional dispute between the Union. The U.S. Supreme Court held that disputes of this nature must be submitted to the National Railway Adjustment Board, pointing out that:

> "In this case the dispute concerned the interpretation of an existing bargaining agreement. It's settlement would have prospective as well as retrospective importance to both railroad and its employees, since the interpretation accepted would govern future relation of those parties. This type of grievance has long been considered a patent cause of friction leading to strikes. It was to prevent such friction that the 1926 Act provided for creation of the Adjustment Board . . . . This voluntary machinery proved unsatisfactory, and Congress . . . passed an amendment which directly created a National Adjustment Board . . . . The Act thus represents a considered effort on the part of Congress to provide effective and desirable administrative remedies for adjustment of railroad-employee disputes growing out of the interpretation of existing agreements." 339 U.S. 242, 243, 70 S. Ct. 577, 94 L. Ed. 799, 800.

But in the *Slocum v. Delaware L & W R. Co.* case, the Supreme Court said:

> "Our holding here is not inconsistent with our holding in *Moore v. Illinois Central Railroad Co.*, 312 U.S. 630, 61 S. Ct. 754, 85 L. Ed. 1089. Moore was discharged by the railroad. He could have challeng-

ed the validity of his discharge before the Board, seeking reinstatement and back pay. Instead, he chose to accept the railroad's action discharging him as final, thereby ceasing to be an employee, and brought suit claiming damages for breach of contract. As we there held, the Railway Labor Act does not bar Courts from adjudicating such actions. *A common law or statutory action for wrongful discharge differs from any remedy the Board has power to provide, and does not involve questions of future relations between the railroad and other employees*". 339 U.S. 244, 70 S. Ct. 580, 94 L. Ed. 800 (emphasis supplied).

The distinction between the *Moore* case and the *Slocum* type of case has been maintained in all subsequent cases. A determination of *Slocum* disputes is one of the stated purposes of the Railway Labor Act . . . to avoid interruption to interstate commerce by requiring collective bargaining agreements and by requiring settling of disputes arising out of the interpretation of such agreements by conciliation, mediation, arbitration or adjustment. 45 U.S.C.A. §151(a). A *Moore* type dispute is strictly a private matter between a railroad and ex-employee in which the ex-employee seeks a remedy the National Railway Adjustment Board is not empowered to give. No questions of disruption of commerce or interpretation of a collective bargaining agreement are involved. In *Transcontinental & Western A. R. v. Koppal*, 345 U.S. 653, 73 S. Ct. 906, 97 L. Ed. 1325 (1953), the U. S. Supreme Court made a slight inroad into the *Moore* rule providing that if local applicable law required an employee to exhaust his administrative remedies in order to sustain his cause of action, he must show that he has done so. 345 U.S. 661, 662, 73 S. Ct. 910, 97 L. Ed. 1330, 1331.

The next two cases of significance were *Pennsylvania Railroad Co. v. Dade*, 360 U.S. 548, 79 S. Ct. 1322, 3 L. Ed. 2d 1422 (1959) and *Union Pacific Railroad Co. v. Price*, 360 U.S. 601, 79 S. Ct. 1351, 3 L. Ed. 2d 1460 (1959). *Dade* was a *Slocum* type of case, where the Supreme Court followed the *Slocum* rule.

Price involved an alleged wrongful discharge. However, in addition to exercising his contractual grievance procedures the discharged employee also sought reinstatement and back pay from the National Railway Adjustment Board. The Board found that he had been properly discharged. Thereafter, he sought common law damages for wrongful discharge in court. The Supreme Court held that the employee's election to submit his grievance to the Board as to the validity of his discharge, precluded him from seeking damages for wrongful discharge in a common law action. In arriving at this result, the Supreme Court referred to *Moore* in two helpful footnotes:

> "Since Respondent, instead of bringing his claim in court as was his right under *Moore* . . . , chose to pursue the claim before the Adjustment Board, he does not even argue that a holding that the Railway Labor Act precludes relitigation of the claims in the courts would deprive him of any constitutional right to a jury trial" 360 U.S. 609, 79 S. Ct. 1355, 3 L. Ed. 2d 1464; N. 6.

> " . . . the holding in *Moore* was simply that a common-law remedy for damages might be pursued by a discharged employee who did not resort to the statutory remedy before the Board to challenge the validity of a dismissal. A different question arises here where the employee obtained a determination from the Board, and, having lost, is seeking to relitigate in the courts the same issue as to the validity of his discharge." 360 U.S. 609, 79 S. Ct. 1355, 1356, 3 L. Ed. 2d, 1465 N. 8.

The dissenting opinion citing *Slocum* emphasized the fact that while the Board has the power to reinstate the employee with back pay, it cannot award him damages for wrongful discharge, which is certainly a different thing. 360 U.S. 620, 621, 79 S. Ct. 1362, 3 L. Ed. 2d 1472.

It is apparent now that a dichotomy appears to be developing within the railroad's strategic pincer movement of the case law. For, if the employee cannot obtain relief from the Board, and he is required to exhaust his administrative remedies, which will then preclude him from seeking his remedies in a court of law, how, then, can the employee ever obtain his civil redress from the wrongdoer railroad? He can not.

Next came, the *Republic Steel Corporation v. Maddox*, 379 U.S. 650, 85 S. Ct. 614, 15 L. Ed. 2d 580 (1965). It is strange that *Maddox* has created so much confusion with respect to the *Moore* case. *Maddox* neither involved a matter arising under the Railway Labor Act, nor claim for wrongful discharge. In *Maddox*, a plant was shut down and the issue was a matter of severance pay due to the employee pursuant to the terms of the outstanding collective bargaining agreement. Of course, the remedy sought in *Maddox* was one the Board was empowered to provide. Thus, *Maddox* is a *Slocum* type case potentially involving a number of employees depending upon the interpretation of the contract.

The main case upon which the Railroad relies is *Walker v. Southern Railway Co.*, 385 U.S. 196, 87 S. Ct. 365, 17 L. Ed. 2d 294, (1966). The *Walker* case is probably the most baffling case of this entire line of cases, and is probably the most misunderstood case in this entire line as well. Not only has the foundation of the case been misunderstood, and the law of the case has been misunderstood, but the implications of the case have been misapprehended by the Court of Appeals in the instant case, and applied in such a manner as to extend and distort the significance of the *Walker* case to the point where it has become a "Pandora's Box" opened to loose little demons of wild speculation, confusion and misapprehension. *Walker*, like *Maddox*, is not a wrongful discharge case.

The Union contract provided that an employee who was absent from work for thirty days without proper excuse lost his senority. The Railroad claimed that plaintiff had been absent for thirty days and deprived him of his senority. The plaintiff claimed that he had been absent for only twenty-nine days. The determination of the controversy thus involved the interpretation of the collective bargaining contract -- how is the thirty-day period computed? The employee snubbed the grievance procedure, treated his employment as terminated, and sued for the wages he would have earned if he had retained senority. See 354 Fed. 2d 950, 951. The Court of Appeals in that case, relying upon *Maddox* held that the plaintiff must first exhaust his contractual and statutory remedies before suing. The U.S.

Supreme Court reversed holding that *Maddox* was not controlling and that, pursuant to *Moore* the plaintiff was entitled to pursue his remedies in court without exhausting his administrative remedies. In so doing, the Supreme Court remarked that because the National Railway Adjustment Board was between seven and one-half and ten years behind in deciding individual employee grievance disputes, the Congress had amended the Railway Labor Act of 1966 in an attempt to remedy the situation. The Court also speculated in the *Walker* case that in the future, assuming the 1966 amendments were indeed the panacea they seemed to be that implicitedly the *Moore* and *Koppal* cases would be overruled.

In the instant case, the Court of Appeals attached so much significance to the implication in the *Walker* case, that their basis for ruling was not predicated upon existing law, but:

> "Appellees urge that we follow *Moore* and *Koppal* until they are actually overruled by the Supreme Court. Normally such urging would be unnecessary but here it must be unavailing. We agree with this comment by Justice Black in the sole dissenting opinion in *Maddox*: that 'Court recognizes the relevance of *Moore* and *Koppal* and, while declining expressly to overrule them in this case, has raised the overruling axe so high that its falling is just about as certain as the changing of the seasons.' Accordingly, the judgment appealed from is affirmed," 441 Fed. 2d 1222 (5th Cir 1971) Appendix page 54-55.

Of course, it is to be seen the significance the Court of Appeals attached to Justice Black's *sole dissenting opinion.* Justice Black was not expressing the Court's view that *Moore* and *Koppal* were not the existing law, or should not express the existing law, but was Justice Black's most concerned dissent even in a *Slocum* type case that access to the Courts should be deprived where it was not clearly taken away. To grasp Justice Black's most consistent and very forceful protection of the right of civil redress through the court systems we should observe and understand Justice Black's dissent in *Maddox* and concurring opinion

in *U. S. Bulk Carriers Inc. v. Arguelles*, _____ U. S. _____ 27 L Ed. 2d 456, 91 S. Ct. _____ (1971). While he concurred in the judgment and opinion of the court he adhered to in his dissent in *Maddox*, in which he expressed the view that the labor and management relations act should never be construed so as to require an individual employee after he is out of a job, to submit a claim involving wages to grievance and arbitration proceedings, or to surrender his right to sue his employer in court for the enforcement of his claim.

This Court, both in the *Arguelles* case and in *Textile Workers v. Lincoln Mills*, 353 U. S. at 451, 456, 1 L. Ed. 2nd 977, 980, redirected its attention to the Section 301 procedures noting that the enforcement by or against labor unions was the main burden of Section 301, though standing by individual employers to secure declarations of their legal rights under the collective agreements recognized. Since the emphasis was on suits by unions and against unions, little attention was given to the assertion of claims by individual employees and none whatsoever concerning the impact of Section 301 on the special protective procedures governing the collection of wages of maritime workers. Maritime unions, of course, like other unions, gain "prestige" by processing grievance claims. *Republic v. Maddox*, supra at 653, 13 L. Ed. 2d 583. An employer's interests are served by "limiting the choice of remedies available to agrieved employees". In *Maddox* there was no express exception governing individual claims of employees from Section 301 grievance procedures and this court declined to carve one out of the circumstances there present. The circumstances are quite different because of the express judicial remedy created by Section 596. The reluctance in *Maddox* to redesign the statutory regime of Section 596.

This Court, of course, in 1971 still expressly refused to redesign the statutory regime of Section 301, which would control this case.

The 1966 amendments have proved to be far less than the salve they were thought to be at the time of the *Walker* decision in 1966. It is now apparent that there is still a backlog, in some districts up to four (4) years, and it is also apparent that the backlogs vary drastically from district to district (36th Annual Report of the National Mediation Board Including the Report

of the National Railway Adjustment Board, Page 75, U. S. Government Printing Office (1970) NMB.1.1:970). Thus, this salve has become an obnoxious ointment further complicating this area of civil redress in several respects. Certainly, the law would not change depending on how well or poorly an administrative board might or might not resolve in a given period of time. While Petitioner insists that the *Walker* case is not applicable, being a *Slocum* type case rather than a *Moore* type case, even if it were, it would be an impossible result if the law were to fluctuate back and forth as the case load of administrative boards might fluctuate. Further, it would amount to unequal protection of the laws if the rule of law varied between districts from time to time depending on their respective case loads. It is well established that every citizen is entitled to the same protection of the law in Chicago, Detroit, Cleveland and Atlanta, Georgia. Any other ruling would be inconceivable, yet the railroad asserts, basically, that such a result must follow from the *Walker* case, if we are to understand that the law would vary depending upon case load.

It must further be noted that the 1966 amendments in no way modified the "may be referred" language of the 1934 amendment. Furthermore there is no indication that the 1966 amendment accomplished the hoped for speed-up in the procedures of the Board. It would be an unreasoned rule if the "may be referred" language of 45 U. S. C. A. §153(l) is to be construed as mandatory or permissive depending on how well some administrative board may from time to time do its job. Certainly, this Court may interstitially legislate, however, there is no suggestion from any record that the 1934 amendment should be or has been legislatively or judicially rewritten to "shall be referred" as in the original 1926 statute.

CONCLUSION

It has been demonstrated that the law as expressed in *Moore* has neither been changed legislatively nor judicially. The 1966 amendments effected only procedural remedies but neither diminished the power of the court nor enlarged the powers of the Board to provide for civil redress on a common-law theory of wrongful discharge seeking damages.

It is equally clear that the course of litigation has developed the railroad's pincer movement to exterminate the employee's constitutional right to jury trial by forcing the employee to go before the Board, which has no power to give damages which plaintiff seeks, yet at the same time to foreclose this employee's right to seek damages in a court of law. Every significant case since *Koppal* has considered this question on the basis of when may a wrongfully discharged employee go to court, i.e. what contractual or statutory remedies must he exhaust as a condition precedent to a common law suit? The elusive question before the Court today is *whether* a wrongfully discharged employee can ever get to court. Only the *Moore* case stands between the employee's access to the judicial system and the mandatory non-remedy administrative jungle. If the *Moore* case is overruled, the impact will not be procedural, but it will forever extinguish the railroad employee's action at common law for wrongful discharge. This Court has historically supported access to the Court for civil redress and it should not now abolish the common law wrongfully discharge cases to accommodate an administrative non-remedy.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that I have on the day below written served counsel for Respondent with the within and foregoing Brief by placing in the United States mail three (3) copies of same in a properly addressed envelope with adequate postage thereon addressed to Robert G. Young, Fulton Federal Building, Atlanta, Georgia.

This _____ day of _____, 1972.

_____

ANDREW W. ESTES

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